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Constitutional Law: Establishment Clause Standing Clarified

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not by the latter,[73] especially since property judgments are normally paid out of the parent's assets, whereas insurance often covers tort judgments.[74]

It has been argued that even partial abrogation of the doctrine will eventually cause the courts to extend this reasoning to all parental torts, including those within the sanctity of the home.[75] Total abrogation of the doctrine, however, would not be an unsatisfactory result if the *Gibson* court's approach of adopting the reasonably prudent parent standard is followed.[76] Adoption of the reasonably prudent parent standard would allow courts to take into consideration the policies supporting parental immunity. Immunity would be granted in those cases where such policies actually outweighed the societal interest in providing negligently injured persons with a remedy.

Basic tort principles demand that personal wrongs be remedied. The Florida Supreme Court has failed to accept this maxim, and in the process, has denied a large class of plaintiffs redress. The instant decision does little to change the court's adherence to the parental tort immunity doctrine. The court fails to recognize the parent-child relationship in its full focus. Parents undeniably require a certain amount of discretion and authority in raising their children. The instant decision, however, grants parents too much discretion. The court should have abrogated the immunity doctrine and adopted a standard of reasonableness viewed in light of the parental role. By adopting the *Gibson* standard in this state, our judicial system would assure both parent and child of a proper and fair adjudication of their claims.

CHARLES A. POSTLER

CONSTITUTIONAL LAW: ESTABLISHMENT CLAUSE STANDING CLARIFIED

American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce,
678 F.2d 1379 (11th Cir. 1982)

Appellant, Rabun County Chamber of Commerce, dedicated a large illuminated Christian cross[1] to a Georgia state park.[2] Appellees, the American

73. *See* McCurdy I, *supra* note 10, at 1075 ("It is common knowledge that some of the most acrimonious family disputes have arisen in respect to property.").

74. *See Gibson,* 3 Cal. 3d at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291.

75. 414 So. 2d at 1070 (Boyd, J., dissenting). *See also* Streenz v. Streenz, 106 Ariz. 86, 90, 471 P.2d 282, 286 (1970) (McFarland, J., dissenting) (fearing that parent could be held liable for any household injury).

76. *See supra* notes 37-42 and accompanying text.

1. 678 F.2d 1379, 1382 (11th Cir. 1982).

2. *Id.* at 1382. Defendant, Georgia Department of Natural Resources, suggested drafting a resolution declaring the cross a war memorial in an attempt to avoid the establishment clause conflict. The resolution failed. Defendant State of Georgia refused to enforce the subsequent order of the Department of Natural Resources to remove the cross. The district court's order of removal was stayed pending the outcome of the instant case, but an injunction against illumination stayed in effect throughout. *Id.*

Civil Liberties Union (ACLU) of Georgia and five individuals, brought suit in federal district court to enjoin appellant from maintaining the cross on public property in violation of the establishment clause in the first amendment of the United States Constitution.[3] The district court ruled that the plaintiffs had standing to bring suit and seek the cross's removal.[4] On appeal, the Eleventh Circuit Court of Appeals affirmed and HELD, the appellees demonstrated sufficient non-economic injury to establish standing in federal court.[5]

The standing requirement derives from the Article III cases and controversies provision of the United States Constitution.[6] It focuses on a party's right to instigate litigation in federal court.[7] A plaintiff must evince sufficient personal interest in a case's outcome to warrant judicial attention to the issues raised.[8] Plaintiffs alleging physical or direct economic injury rarely face standing problems.[9] When a constitutional issue is raised, however, standing has proven a substantial limitation on federal court access.[10] A plaintiff must claim specific personal injury resulted from the defendant's allegedly unconstitutional conduct.[11]

Standing has been almost exclusively a twentieth century concern.[12] Courts have only recently addressed the issue in establishment clause claims.[13] The United States Supreme Court first granted standing under the establishment clause in the leading case of *Abington School District v. Schemp*.[14] The parents of students sued to enjoin Pennsylvania from enforcing a statute requiring daily Bible reading in public schools.[15] The Court explained that establishment clause claims result from governmental non-neutrality in the advancement or inhibition of religion.[16] Unlike the free exercise clause, establishment claims do not require proof that a specific religious freedom was violated.[17]

3. *Id.*

4. *Id.*

5. *Id.* at 1389.

6. U.S. CONST. art. III, § 2.

7. *See* Flast v. Cohen, 392 U.S. 83, 98-99 (1968). The Court stated: "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 99.

8. Baker v. Carr, 369 U.S. 186, 204 (1966).

9. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 73-79 (1978).

10. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982) (spiritual stake in first amendment values insufficient for standing); Doremus v. Board of Educ., 342 U.S. 492 (1952) (standing denied in establishment clause claim).

11. *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

12. *See* Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144 (1977).

13. The first substantial discussion of establishment clause standing came in the case of Doremus v. Board of Educ., 342 U.S. 492 (1952).

14. 374 U.S. 203 (1963).

15. *Id.* at 205. The statute, 24 PA. STAT. § 15-1516 as amended, Pub. L. 1928 (Supp. 1960), read: "At least ten verses from the Holy Bible should be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." *Id.*

16. 374 U.S. at 222-24.

17. *Id.* at 223-24.

In *Abington*, the government action breached neutrality standards because students had to either refuse to attend the prayer reading or subject themselves to the religious exercise.[18] The Court found the requisite personal injury to confirm standing[19] and held the statute violated the establishment clause of the first amendment.[20] *Abington* established that a plaintiff without physical or economic injury may litigate establishment clause claims in federal court.[21]

Non-economic and non-physical injury were asserted as grounds for standing again in *Sierra Club v. Morton*.[22] Although not an establishment clause case, *Sierra Club* is an important link in the doctrinal development of standing.[23] The Sierra Club, a non-profit organization dedicated to preserving national parks, sought to prevent the federal government from issuing a permit allowing commercial development of the Mineral King Valley.[24] Plaintiff's alleged injury stemmed from anticipated deleterious changes in the valley if development were allowed.[25] A divided Court rejected the Club's claim of standing as a representative of the public.[26] The Court, however, averred that the Club would have established standing had it alleged that any individual member's use of the park would be affected by the proposed development.[27]

In *Valley Forge Christian College v. Americans United for Separation of Church & State*,[28] the Supreme Court reevaluated the personal injury requirement for standing to bring an establishment clause claim. Plaintiffs sought to enjoin the government from gratuitously transferring surplus federal property to a religious organization.[29] The plaintiffs claimed standing as taxpayers concerned about the use of tax dollars to support a religious institution.[30] The Court held plaintiffs lacked standing since they failed to show clear and tangible personal injury.[31] Rejecting any exception for establishment clause claims,[32] the Court found plaintiff's claim indistinguishable

18. *Id.* at 223-25.

19. *Id.* at 224 n.9 (since the children could not bring suit in their own right the Court considered the parents directly affected and conferred standing on both).

20. *Id.* at 226.

21. *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

22. 405 U.S. 727 (1972).

23. The Club sought standing under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976). Because the injury in fact requirement is a constitutional minimum, the person "adversely affected or aggrieved by agency action" must still meet the minimum requirements. 405 U.S. at 735.

24. 405 U.S. at 730.

25. *Id.* at 734.

26. *Id.* at 734-35.

27. *Id.* at 735.

28. 102 S. Ct. 752 (1982).

29. *Id.* at 756-57. The property was disposed of under the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, 40 U.S.C. §§ 471-544 (1976 & Supp. III 1979). 102 S. Ct. at 755.

30. 102 S. Ct. at 757, 761. A detailed analysis of taxpayer standing is beyond the scope of this comment. *See generally* Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

31. 102 S. Ct. at 767.

32. *Id.*

from the general interest shared by all citizens in preserving constitutional governance.[33]

Despite its refusal to grant standing, the *Valley Forge* Court specifically reaffirmed that standing may be granted on the basis of non-economic injury.[34] Article III's "irreducible minimum" standard of injury requires the plaintiff to show some personal injury, either actual or threatened, resulting from the defendant's allegedly illegal conduct.[35] The plaintiff must also demonstrate that the injury is capable of being redressed by a favorable decision.[36] Justice Rehnquist's majority opinion stressed that the establishment clause does not grant overzealous plaintiffs authority to search out and challenge governmental action as ombudsmen for the public weal.[37]

The instant court attempted to differentiate between the plaintiffs' valid personal injury claim in *Abington* and the insufficient general grievance in *Valley Forge*.[38] As in *Abington*, the instant plaintiffs demonstrated individual injury[39] rather than a mere affront to their interpretation of the establishment clause.[40] The cross was located next to a public campsite and two of the plaintiffs were campers.[41] Both testified they had not and would not use Black Rock Mountain State Park solely because of the cross's presence.[42] Thus, the court found injury because the plaintiffs were forced to use other parks or endure the offending religious symbol.[43] The court viewed this injury as similar

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33. *Id.* at 764.

34. *Id.* at 766. The Court cited United States v. SCRAP, 412 U.S. 669 (1973) as an example of sufficient non-economic injury. It would be difficult to conceive of a more attenuated injury than found in *SCRAP*. The plaintiffs alleged that a proposed rail freight increase would discourage the transportation of recyclable materials, retarding their use and causing a greater consumption of local natural resources. It also would lead to greater amounts of refuse left in Washington area national parks, which the plaintiffs themselves used. The Court thus found a specific injury separating the plaintiffs from all other citizens who had not used the park. *Id.* at 689.

35. 102 S. Ct. at 758.

36. *Id.*

37. *Id.* at 766. The majority also listed three policies in Article III that implicitly prompt the personal injury requirement: judicial realism, restriction of factually different lawsuits, and maintenance of the autonomy of those affected by a judicial decree. *Id.* at 758-59.

38. The court recognized that all three plaintiffs were asserting similar constitutional claims. Any distinction, therefore, could only be based on facts. 678 F.2d at 1388.

39. *Id.* at 1388-89.

40. *See id.* The district court found standing for the plaintiffs based on their "spiritual stake in First Amendment values." 510 F. Supp. at 890 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970)). Since that holding was no longer viable after *Valley Forge*, the instant court followed the majority's example in *Valley Forge* and examined the facts for other injury. 678 F.2d at 1384.

41. 678 F.2d at 1384.

42. *Id.* at 1388.

43. *Id.* While such an injury is not severe, magnitude of harm has never been a consideration in standing. *See* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 614 (1968). To illustrate that it is not illogical to allow standing for a "trifling" injury yet deny it for no injury, Davis used a common law example. In an action for trespass, battery, or assault, the act that gives rise to a cause of action may be so insignificant that no injury is apparent. Yet that "trifling" is the difference between a legally cognizable injury and nothing at all. *Id.*

to that borne by the plaintiffs in *Abington*.[44]

The defendants argued the alleged injury was analogous to that in *Valley Forge* because both plaintiffs lived more than one hundred miles from the campsite[45] and neither actually camped in Black Rock Mountain State Park.[46] Only one plaintiff had seen the cross prior to filing suit, and then only from an airplane overhead.[47] Rejecting these arguments, the court stressed the plaintiffs were Georgia citizens who frequently used the state park system.[48] In the court's view, requiring actual use of the park before bringing suit would reduce Article III to a bare technicality.[49] Since the two campers met the standing requirements based on the finding of true injury, the court found it unnecessary to inquire into the remaining plaintiffs' status.[50]

The instant court abided by constitutional constraints and precedent.[51] Despite the lack of a clear standard for determining standing,[52] the court carefully examined the factual differences between the instant case and *Valley Forge*.[53] The *Valley Forge* plaintiffs claimed no more injury than that suffered by all citizens resulting from a breach of constitutional governance.[54] The instant plaintiffs, however, demonstrated personal, palpable injury stemming from their inability to use a public facility because it contained an offensive

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44. 678 F.2d at 1389.

45. *Id.* at 1383-84.

46. *Id.* at 1388 n.18. The cross had been in the park since 1957. Plaintiffs testified that they had not used the park specifically because of the cross's presence there. *Id.*

47. *Id.* at 1388.

48. *Id.*

49. *Id.* at 1388 n.18.

50. *Id.* at 1389. The court cited Watt v. Energy Action Educ. Found., 102 S. Ct. 205 (1981), to support its determination. In *Watt*, nine consumer groups, two state government entities, and three private citizens filed suit against the United States and the secretaries of Energy and Interior. Respondents alleged that the secretaries misused their discretion by not employing a specific bidding procedure when leasing offshore oil and gas tracts. *Id.* at 211. Because the State of California was found to have standing, the court declared it was not necessary to consider the status of the other plaintiffs. *Id.*

51. For example, the decision comports with Gladstone Realtors v. City of Bellwood, 441 U.S. 91 (1979), which determined a plaintiff must show actual or threatened injury to satisfy the case and controversy requirement of Article III. In the context of environmental concerns, an effect on a person's use and enjoyment of land is sufficient non-economic injury to confer standing. *E.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). *See also* Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) (plaintiffs, residents of Washington, D.C., had establishment clause standing to challenge placement of illuminated nativity in park near White House).

52. Standing is a protean subject. One commentator has called it "among the most amorphous in the entire domain of public law." *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, 498 (1966). Another authority flatly pronounced the Supreme Court's law of standing as "cluttered, confused, and contradictory. . . ." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18 (Supp. 1965). Even Justice Frankfurter, "found himself reduced to a nearly unprecedented degree of inarticulateness" when discussing the standing concept. L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 461 (1965).

53. 678 F.2d at 1388.

54. 102 S. Ct. at 764. In denying standing, the Court noted the plaintiffs' lack of particularized injury. *Id.*

religious symbol.[55] This personal injury in fact[56] satisfied the requirements for standing to sue in federal court.[57] By emphasizing these salient facts, the court granted standing without violating *Valley Forge*'s restrictive holding.[58]

Although the instant decision clearly falls within the conceptual parameters of *Valley Forge*,[59] it may result in greater access to federal courts.[60] By utilizing the *Valley Forge* analysis to find standing through non-economic, non-physical injury, the court has clarified the barriers facing subsequent plaintiffs who attempt to litigate establishment clause claims.[61] In this sense, the instant decision "liberalized" standing requirements. Commentators suggesting a more liberalized standing doctrine have been criticized as ignoring Article III's implicit policy concerns.[62] Doctrinal relaxation would supposedly encourage trivial and collusive suits forcing the federal courts from their proper role of resolving actual controversies.[63] Such criticism is inapplicable to the instant

55. 678 F.2d at 1389. The establishment clause issue was readily decided in the plaintiff's favor. The cross was a religious symbol placed in a public park with the encouragement of the county officials. Because such a state-supported religious symbol violated the required governmental neutrality, the district court's decision was promptly affirmed. *Id.* at 1391.

56. *Id.* The injury in fact must be more than a "mere psychological reaction" caused by the offending symbolism. *Id.* at 1388. Plaintiffs will have to show that the religious symbol either prevented them from using the public facility or made them bear an onerous burden in subjecting themselves to the religious symbolism. *Id.* at 1388-89.

57. The court must also determine that a favorable decision will redress the claimed injury, although this requirement was not questioned in the instant case. *Id.* at 1384 n.10. This requirement, plus the requirement of actual or threatened injury caused by the challenged action, comprise the constitutional minimum. *See* Scott, *supra* note 30, at 669. Additional prudential requisites are sometimes sought by the court. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968) ("double nexus" required by the Court in taxpayer suit in addition to the constitutional minimum).

58. 678 F.2d at 1383-84. The court reasoned that standing was consistent with the *Valley Forge* rationale because the plaintiffs-appellees demonstrated "a cognizable injury in fact sufficient to invoke the jurisdiction of this court." *Id.* at 1384.

59. *Id.* at 1386-89. The court was extremely careful to base its standing finding on *Valley Forge* and its predecessors. *Id.*

60. *See supra* text accompanying notes 54-56. For one Justice's opinion on the necessity of expansive federal court access, see Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

61. The instant decision's formulation of sufficient personal injury to confer standing applies only to non-taxpayer claims under the establishment clause. Since the instant case was not a taxpayer's suit, those wishing to challenge the constitutionality of governmental action as taxpayers will have to rely on *Valley Forge*. It is also unclear whether this opinion might be used to establish standing for first amendment free exercise claims. As Justice Brennan's emphatic dissent pointed out, the majority's reasoning in *Valley Forge* resulted in an opinion that "tend[s] merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law." 102 S. Ct. at 768 (Brennan, J., dissenting).

62. Those who would prefer to see standing requirements relaxed to the constitutional minimum include University of Chicago Professor Kenneth Culp Davis and Justice William Brennan. *See* Scott, *supra* note 30, at 669. For an opposing viewpoint, see Sager, *Insular Majorities Abated*, 91 HARV. L. REV. 1373, 1378 (1978) ("Marbury Model" endangered by the loosening of the personal stake requirements asserting that standing could then be "conferred on a plaintiff whose only concern is concern itself. . . ."). *Id. Cf.* Albert, *supra* note 12, at 1148 ("alluring simplicity of entitling persons significantly aggrieved to relief is illusory."). *Id.*

63. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 69-71 (1978). A suit is collusive when an individual or organization brings an action not intended to settle an actual controversy